

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA)	
)	
v.)	Criminal No. 01-455-A
)	Judge Leonie M. Brinkema
ZACARIAS MOUSSAOUI)	

**DEFENDANT'S RESPONSE TO GOVERNMENT'S OPPOSITION TO DEFENDANT'S
MOTION TO RECONSIDER COURT'S ORDER OF JUNE 25, 2002 GRANTING THE
GOVERNMENT'S MOTION TO WITHHOLD PLACES OF ABODE OF PROSPECTIVE
WITNESSES**

Defendant Zacarias Moussaoui ("Moussaoui"), through counsel, respectfully files his response to the Government's opposition (the "Opposition") to his Motion to Reconsider Court's Order of June 25, 2002 Granting the Government's Motion to Withhold Places of Abode of Prospective Witnesses (the "Motion").

ARGUMENT

In opposing the Motion, the Government argues that removal of Moussaoui as his own counsel does not warrant reconsideration of the Court's June 25 Order and that, in any event, the Court lacks the authority to order the production of more than "the county or township of residence" for the Government's witnesses. Opposition at 1-2, 5. These arguments are without merit and should be rejected.

I. The Government Can No Longer Establish By A Preponderance Of The Evidence That Disclosure To Defense Counsel Of The Places Of Abode Of The Government's Prospective Witnesses May Jeopardize The Life Or Safety Of Those Witnesses.

It bears repeating that under 18 U.S.C. § 3432, the provision to the defense of the place of abode of each of the Government's witnesses is *mandatory* unless the Court finds by a "preponderance of the evidence" that by doing so, the life or safety of

any person might be jeopardized. As such, the safety of the Government's prospective witnesses under the statute is presumed. Thus, it is not necessary for Moussaoui to show that granting his Motion would make this case "a safer one in which to testify" or result in "no security concern[s]" for the witnesses. Opposition at 1, 3. Rather, it is the Government that bears the burden of overcoming the presumptive disclosure obligation mandated by the statute.

It also bears repeating that the information the Motion seeks would be provided only to defense counsel (and selected staff), not to Moussaoui himself. Nor would the information be available to the public or media as it would be filed under seal with the Court. Motion at 4-5.

These two latter points are especially important given the reasons the Government offers to satisfy its burden under the statute, to wit, the serious nature of the charges, Moussaoui's entry of a guilty plea to those charges, Moussaoui's threatening public pronouncements, and the "history of leaks to the media in this case." Opposition at 2-4. These reasons might justify withholding the requested information from Moussaoui as a *pro se* defendant, but none of them, except possibly the last one, justify withholding the information from *defense counsel* - who, as noted, are the only ones for whom access is sought.

As for the "history of leaks," the Government does not explain why defense counsel would leak the information and risk the ire of this Court, not to mention their bar licenses and the safety of the witnesses. Nor does the Government explain why sealing the information would not suffice to protect it from the media and the public.

That said, defense counsel is not blind to the danger to the witnesses that leaks - including those by Government officials outside of the Office of the U.S. Attorney - could produce. For this reason, counsel is willing to further limit disclosure of the witnesses' addresses to two defense counsel and two defense investigators. Given this additional concession, the speculative possibility that the witnesses' addresses could be leaked is insufficient to satisfy the Government's burden - by a preponderance of the evidence - that "providing the [addresses] may jeopardize the life or safety of any person."¹ 18 U.S.C. § 3432.

II. The Government's Witness List Should Include Each Witness' Complete Home Address And Telephone Number.

Characterizing the defense's request for the home addresses and telephone numbers of the Government's witnesses as "unprecedented," "outrageous," and "brazen," Opposition at 3, 5, the Government asserts that "place of abode" under 18 U.S.C. § 3432 means "the county or township of residence for the witness, not his or her street address." Opposition at 5. While it is true that the Government's definition has been adopted by some courts, it is equally true that other courts have interpreted

¹ This concession amply demonstrates why the Government is incorrect to characterize the revocation of Moussaoui's *pro se* status as "of little significance" to the Motion. Opposition at 1. If Moussaoui were still counsel of record, standby defense counsel would lack authority to agree to limit disclosure of the witnesses' addresses to select members of the defense team. Moreover, as a *pro se* defendant, Moussaoui would have a right under 18 U.S.C. § 3432 to personally receive the witnesses' addresses, and perhaps interview them as well. See June 25 Transcript at 31. These eventualities are completely avoidable now that Moussaoui is no longer representing himself.

“abode” more commonsensically,² ordering or allowing the disclosure of additional witness information, including their home address and/or telephone numbers.

Attached to the Defendant’s Motion, for instance, is an order from Judge Lee of this very District in the case of *United States v. Lentz* wherein he ordered the Government to provide to the defense each witness’ “name, address, and telephone number.” See *Lentz* June 22 Order at 5.³ Also cited in the Motion is an opinion from the Massachusetts Federal District Court construing “place of abode” “to mean [the witnesses’] home addresses.” *United States v. Sampson*, 297 F. Supp.2d 340, 340-41 (D. Mass. 2003). This construction was required, that Court concluded, “because a township [rather than a street address] may be inadequate to identify a person with a common name.” *United States v. Sampson*, 335 F. Supp.2d 166, 177 (D. Mass. 2004). This reasoning applies with even more force to Moussaoui’s case where the Government is currently required only to provide the *country* of residence for, what is expected to be, its long list of witnesses.

Other courts, also cited in the Motion, have equated “place of abode” with

² The common definition of “abode” is “the place where one abides: Home.” *Merriam-Webster’s Collegiate Dictionary* 3 (10th ed. 2001); see also *Black’s Law Dictionary* 1187 (8th ed. 2004) (defining “place of abode” as “[a] person’s residence or domicile”).

³ The Government asserts that Defendant’s citation to Judge Lee’s order is “simply meaningless” because the order was issued pre-trial and was not in connection with a terrorism case. Opposition at 4-5. Judge Lee’s order, however, was not cited because of the nature of the case before him, but to establish that a federal district court has the authority to order the disclosure of each witness’ home address and telephone number - authority that is not dependent upon the nature of the case before the court.

“address.” See *Gregory v. United States*, 369 F.2d 185, 187-88 (D.C. Cir. 1966) (stating that 18 U.S.C. § 3432 requires the Government to furnish a “list of the names and addresses of [its] witnesses”); *United States v. Aiken*, 76 F. Supp.2d 1339, 1343 (S.D. Fla. 1999) (same).⁴ Indeed, in *United States v. Frank*, 11 F. Supp.2d 322, 326 (S.D.N.Y. 1998), the U.S. Government agreed to provide “the witnesses’ actual addresses,” notwithstanding the fact that “some courts have interpreted ‘place of abode’ to refer to a witness’ township of residence, and not address.”

The Government also disputes Moussaoui’s need for the witnesses’ addresses claiming that the “unprecedented amount of discovery” produced in this case “serve[s] as a virtual roadmap for preparing the defense.” Opposition at 5-6. The short answer to this claim is that establishing a “need” for the information is not required by the statute. In capital cases, the production of the witness information is presumed; it is the Government that must establish, by a preponderance of the evidence, a need *not* to produce the information.

More importantly, Moussaoui’s need for the witness information arises, in part, because of the vastness of the discovery and the difficulty in isolating, among the thousands of pages of produced material, those individuals who the Government will call as witnesses. It also arises because among the classified documents, virtually all of the first names, and many of the last names, have been redacted out. Of course, identifying the witnesses who will be used to prove the indictment so that defense

⁴ These cases were also cited by the *Sampson* Court in support of its holding. See *Sampson*, 297 F. Supp.2d at 340-41.

counsel may attempt to interview them is the primary reason for the enactment of the statute. *United States v. Insurgents of Pa.*, 26 F. Cas. 499, 514 (C.C.D. Pa. 1795) (No. 15,443) (“The object of the law was to enable the party accused . . . to identify . . . the witnesses who were to prove . . . the indictment against him.”); *Gregory*, 369 F.2d at 187-88 (“The purpose of 18 U.S.C. § 3432 . . . is to assist defense counsel in preparing the defense by interviewing the [Government’s] witnesses.”).

Finally, there is no question that, as the Government notes, the safety of the witnesses in terrorism cases is of special concern. Opposition at 6. However, those concerns must be balanced against the right of a capital defendant generally, and particularly under 18 U.S.C. § 3432, to mount an effective defense. The Government’s position - of providing merely the *country* of residence for its witnesses - swings the pendulum too far in the Government’s favor. By placing the witnesses’ addresses and telephone numbers under seal, and by limiting disclosure of this information to only two defense counsel and two defense investigators (and not Moussaoui), the witnesses’ safety will be adequately protected and the purpose of the statute more effectively served.

CONCLUSION

For the foregoing reasons, Defendant respectfully moves the Court to grant this motion and order the Government to provide to defense counsel, under seal, the complete street address and telephone number of each of the non-expert witnesses the Government intends to call at the penalty phase of this case.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing pleading was served upon AUSA Robert A. Spencer, AUSA David Novak and AUSA David Raskin, U.S. Attorney's Office, 2100 Jamieson Avenue, Alexandria, VA 22314, by hand-delivering a copy of same to the Court Security Officer on this 8th day of September 2005.⁵

/S/

Kenneth P. Troccoli

⁵ Because there was insufficient time to have this pleading reviewed for classified information as required by the Court's order of October 3, 2002 (dkt. no. 594), *see id.* at 2 (allowing forty-eight hours for the classification specialist to complete the classification review), this pleading has been filed as a presumptively classified document with the CSO, who will then perform a classification review. A copy of this pleading will not be provided to Moussaoui until after that review determines that the pleading is unclassified.